United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-2082

JUL 17 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND JUDICIAL CIRCUIT

DOCKET NO.

JOSEPH FIORE,
PETITIONER-APPELLANT,

-VS-

UNITED STATES OF AMERICA,
RESPONDENT-APPELLEE.

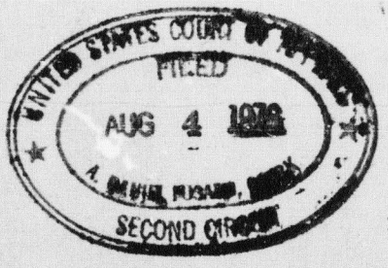
T-5928

B
P/S

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT,
and Appendix

JOSEPH FIORE
u.s. prison
ATLANTA GEORGIA
30315



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UNITED STATES COURT OF APPEALS
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JOSEPH FIORE,
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FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT

ISSUES PRESENTED FOR REVIEW

THE DISTRICT COURT ERRED WHEN IT ACCEPTED A PLEA OF GUILTY BY FAILING TO ADVISE THE DEFENDANT AS TO THE CONSTITUTIONAL RIGHTS WHICH HE WAS WAIVING AND BY FAILING TO ASCERTAIN WHETHER OR NOT THE DEFENDANT UNDERSTOOD THE NATURE OF THE CHARGE.

STATEMENT OF THE CASE

On 14th February 1956, petitioner-appellant (hereinafter defendant) was charged in a two (2) count indictment in the United States District Court, Southern District New York, with having violated the Federal Narcotic Laws: 21 USC Section 173 and 174. On 16th December 1957, defendant entered a plea of guilty to the charges contained in the indictment and sentenced to two (2) years imprisonment on each count, with sentences ordered to run concurrently, and suspended and then ordered to be placed upon one day probation.

In May 1974, defendant filed a motion to vacate sentence, pursuant to the provisions of 28 USC Section 2255, in the United States District Court, Southern District New York, and on 27th February 1976 defendant was first advised that said motion was denied by the court below on 30th December 1975 and filed with the court on 6th January 1976, it is from said order this defendant appeals as a matter of right and justice.

ARGUMENT

In 1956, when defendant plead guilty to the offense, Rule 11 of the Federal Rules Criminal Procedure read, in pertinent part:

> "A defendant may not plead guilty, guilty, or with the consent of the court, nolo contendre. The court may refuse to accept the plea without just determining that the plea is made voluntarily with understanding of the nature of the charge. (Emphasis supplied)

In the instant case, the court below made no effort to determine whether the defendant understood the nature of the charge, or that the plea was made voluntarily. The actual colloquy between the court and this defendant was so sparse that it is easily set forth herein:

"THE CLERK: Have you had a copy of the indictment?

MR. CHAPMAN: Yes.

THE CLERK: Joseph Fiore.

THE DEFENDANT: Yes.

THE CLERK: The indictment charges that on or about the 4th of February, 1956, you did unlawfully sell approximately 432 grains of heroin.

On or about the 20th of February, 1956, you unlawfully sold approximately 867 grains of heroin.

Do you plead guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: To both counts?

THE DEFENDANT: Yes.

THE CLERK: Pleads guilty to both counts.

THE COURT: A mandatory sentence here.

MR. CHAPMAN: No.

(Mr. Lunney made a statement to the Court on behalf of the Government.)

(Mr. Chapman made a statement to the Court on behalf of the defendant.)

THE COURT: Two years on each count of the indictment to be served concurrently, sentence suspended, and probation for one day.

I do not think it will serve the interests of justice to impose another sentence on this defendant."

Nowhere does the court even allude to, let alone determine that defendant knew what constituted the crime for which he was charged, let alone its basis. The court could have read and explained the indictment in its entirety, or at least explained what constituted the elements of the charge, or if defendant was, in fact, guilty, but the court did none of those things. The court below failed to determine whether or not the plea of guilty was entered voluntarily, or with even a semblance of understanding of the nature of the charge. If the phrase "understanding of the nature of the charge" is to include anything at all within its scope, intent or purpose, it must at least investigate the circumstances under which the plea is made. Van Moltke v. Gillies, 332 U.S. 708 (1948).

The record in this case is totally lacking in circumstances from which it is evident that the defendant had the requisite understanding. How the court below found reason to deny the motion to vacate sentence was at best, stretching the record to the extreme. In Julian v. United States, 236 F.2d 155 (6th Cir. 1956), the court said:

> "In order to comply with the rule the district court need not follow any particular ritual. The pre-requisite is that the defendant understand the consequences of the plea, United States v. Swaggerty, 218 F.2d 875 (7th Cir. 1955). A brief discussion with the defendant regarding the nature of the charges may normally be the simplest and most direct means of ascertaining the state of his knowledge. United States v. Davis, 212 F.2d 264 (7th Cir. 1954). 236 F.2d at 158. (Emphasis added)

In United States v. Morgan, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1953), a case strikingly similiar to the one at bar, the United States Supreme Court held that the writ of error coram nobis was available to a defendant in practically the identical situation presented herein. The defendant in Morgan was attacking a 1939 conviction had on a plea of guilty for which he had already served the sentence, but which served to enhance the sentence he was given as a second offender in a 1950 conviction. Like defendant in the instant case the defendant in Morgan alleged that at the time he plead guilty he was not advised as to his rights. The Supreme Court concluded that the record did not support a valid waiver of his constitutional rights, when it stated:

> "In this state of the record we cannot know the facts and thus we must rely on respondent's allegations. 346 U.S. at 513."

Even a cursory reading of the plea transcript will show that the judge did nothing which could qualify as compliance with the Rule 11 requirement as it stood in 1956 and that he had determined the defendant understood the nature of the charge, and for that reason alone, the relief

which this defendant requests must be granted. Yet, perhaps, an even greater error was the failure of the trial court to advise defendant of the constitutional rights which he waivered by his plea of guilty.

In addition to requiring the court determine that the defendant understood the nature of the charge, Rule 11 also requires that the court determine the plea is voluntarily. A plea cannot be voluntarily made if a defendant is unaware that he has the alternative of a jury trial where he can confront and cross-examine the witnesses against him and not be compelled to testify against himself. The fact of a plea itself cannot be held to constitute a voluntary waiver for in the language of Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461, (1948):

> "It has been pointed out that 'court indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquienscence in the loss of fundamental rights. . . A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

From the above, it is evident that defendant's 1956 conviction and resulatant sentence was based on an invalid plea in that Joseph Fiore was not aware of the nature of the charge to which he lead and was unaware of the constitutional rights which he forfeited by his plea.

CONCLUSION

Petitioner-appellant requests that in the interest of justice that

the order of the court below be reversed and that this cause remanded where petitioner-appellant can plead anew.

Joseph Fiore

Joseph Fiore
u.s. prison
Atlanta Georgia
30315

CERTIFICATE OF SERVICE

I, Joseph Fiore, certify that I have this 4th day of June 1976 served a copy of the foregoing Brief of Petitioner-Appellant to the following named by placing same in the U.S. Mail:

United States Court of Appeals
For the Second Judicial Circuit
Office of the Clerk
Foley Square
New York NY 10007

United States District Court
Southern District of New York
Office of the United States Attorney
Foley Square
New York NY 10007

Joseph Fiore

Joseph Fiore
u.s. prison
Atlanta Georgia
30315

CERTIFICATE OF COUNSEL

Joseph Fiore v. United States

The undersigned, acting in his own behalf; certifies that Joseph Fiore and Charles E. Stewart, Judge, United States District Court, Southern District of New York, has an interest in the outcome of this case. This representation is made in order that Judges of this Court, and those who might be sitting on assignment, may evaluate possible disqualification or recusal pursuant to the Local Rules of this Court.

Joseph Fiore

Joseph Fiore
u.s. prison
Atlanta Georgia
30315

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE STEWART

PRO SE

Jury demand date:

D. C. Form No. 106 Rev.

74 CIV 1806

TITLE OF CASE	ATTORNEYS
JOSEPH FIORE V UNITED STATES OF AMERICA	For plaintiff: JOSEPH FIORE BOX P.M.B.69988-158 Atlanta Ga.30315 For defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed x	Clerk	1-22			
J.S. 6 mailed	Marshal				
Basis of Action: Habeas Corpus	Docket fee				
	Witness fees				
Action arose at:	Depositions				

JOSEPH FIORE V. U.S.A.

74 CV. 4708

DATE	PROCEEDINGS	Date Order & Judgment No.
ct.31-74	Filed Motion to vacate Judgment	
ct.31-74	Filed order permiting petitioner to proceed in forma pauperis w/o prepayment of fees or costs - MacMahon,J.	
ct.31-74	Filed Notice of Referral	
1-20-75	Filed Government's memorandum of law in opposition to the Petitioner's motion to vacate his guilty plea	
2-01-75	Filed Petitioner's response to Government's opposition	
11-06-75	Filed Memorandum #1666 No hearing is required in the instant case and we dismiss the petition m/n	
3-31-76	Filed memo. of Judge Stewart granting leave to appeal in forma pauperis ---- Stewart, J.	
4- 01-76	Filed pltf. notice of appeal to the U.S.C.A for the Second Circuit from order of 12-30-76 mailed notices to Joseph Fiore, U.S. Atty's and Superintendent Atlanta m/n by jpc-sc	

M-263

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JOSEPH FIORE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

- x

#43666

74 Civ. 4796

MEMORANDUM

STEWART, DISTRICT JUDGE:

On December 16, 1957, petitioner Fiore plead guilty to two counts of violation of the federal narcotics laws and was sentenced to two years imprisonment on each count. The sentences were to run concurrently and were suspended; petitioner was placed upon one day probation. Petitioner, now serving a twenty year sentence imposed upon him as a second offender on January 21, 1972, moves to vacate his 1957 guilty plea.

First, Fiore contends that the requirements of Rule 11 of the Federal Rules of Criminal Procedure, as construed in McCarthy v. United States, 394 U.S. 459 (1969), were not followed when he gave his plea in 1957. However, McCarthy, decided in 1969, is not retroactively applied (Halliday v. United States, 394 U.S. 831 (1969)) and thus does not bear upon the 1957 plea.

While petitioner does not state what consequences of

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his plea he was not informed of, it appears his claim is that he was not informed about the potential sentence which could be imposed.[1/] In Jones v. United States, 440 F.2d 466 (2d Cir. 1971), the court held that Rule 11 required the court to advise the defendant of the maximum sentence. In Grant v. United States, 451 F.2d 931 (2d Cir. 1971), the court held that pleas entered prior to Jones without the required advice would be "subject to attack only on the basis of involuntariness in the constitutional sense." 451 F.2d at 933. Thus, to make out a claim here it is necessary for petitioner to allege and prove that he was not aware of the sentencing possibilities and that he would not have plead guilty had he known of those possibilities. United States v. Welton, 439 F.2d 824 (2d Cir. 1971). Under Welton, petitioner must also submit an affidavit of his attorney in support of his claim or his own affidavit explaining why he cannot obtain such an affidavit from his attorney. Petitioner here does not comply with any of the requirements set forth in Welton.

No hearing is required in the instant case and we dismiss the petition.

SO ORDERED.

Dated: New York, N.Y.
December 30, 1975

Charles E. Stewart Jr.
United States District Judge

1/ The government correctly points out that if Fiore complains that he was not told of the possible sentence for a second offender, as Fiore subsequently became, such advice is not required. Weinstein v. United States, 325 F. Supp. 597 (C.D. Cal. 1971), citing Fee v. United States, 207 F. Supp. 674, 676 (W.D. Va. 1962) ("[t]he court...[has] a right to assume that the defendant will not be guilty of a subsequent offense.")